No. 15348

In the
United States Court of Appeals
For the Ninth Circuit

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

PORTER BARRETT,

Appellee.

Appellee's Reply Brief

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STATEMENT OF CASE

Appellee, Porter Barrett, filed this action by reason of injuries received March 11, 1955, while working as a dining car waiter, on a train owned and operated by the appellant, and while both were engaged in the furtherance of interstate commerce. As to liability of appellant, counsel for defendant in the court below stated:

> "In trying to view this case not as an advocate, but in making an attempt to see it objectively, I can see that there would be sufficient basis for the jury to have found the railroad company negligent in this case." (R. p. 160)

Appellee testified that his injuries were sustained by reason of a chill box door being slammed against his head, by a fellow employee. That he found himself dazed sitting in the middle of the floor. His head was bleeding and his head and neck were hurting him. (R. p. 92) That during the month of April he saw his own physician, Dr. Jacobs, who advised him to see his company doctor. (R. p. 93) Appellee called on Dr. Mathews, defendant physician, at Los Angeles, who advised taking x-rays in Chicago. An order was issued 4/22/55. (R. p. 98) Mr. Ford a supervisor advised appellee not to go to the hospital in Topeka. (R. p. 98) Barrett then saw Dr. Buttice, a company doctor, the latter part of April 1955, who took x-rays. He complained to Dr. Buttice of terrific headaches, and that his neck was very stiff. (R. p. 99) He did not treat him. (R. p. 100) He then saw another company doctor at 105 South La Salle. He complained to him about his head and neck but the doctor only cleaned out his ears. (R. p. 100) The appellee then saw another company doctor at 104 South Michigan Avenue and complained about terrific headaches and stiff neck. He first noticed the jerking of the neck about the last of May or the first of June, (R. p. 102) and it has continued since that time. In December he again went to see Dr. Jacobs, who again advised that he see his company doctor, but instead he saw Dr. Darrington Weaver who referred him to Dr. Morris Goren. (R. p. 103) Dr. Goren diagnosed the case as spasmodic torticollis, due to a blow on the head he received March 11, 1955 (R. p. 78) and that it may last the rest of his

life. On cross-examination it was revealed that Dr. Heifitz told Dr. Goren that plaintiff had a fairly severe cerebral concussion, with a functional overlay, with a functional condition of spasmodic torticollis, based upon a marked emotional reaction. Dr. Goren also testified that, actually we do know that this man did sustain a head injury and that following that head injury certain pressures developed, including this spasmodic torticollis. (R. p. 82) He had tenderness over the right sterno mastoid incision. By palpitation over that region of the mastoid incision he had tenderness in that region, and there was intermittant spasm, in other words, that muscle goes into spasmodic state and throws his head in peculiar positions, the jerking of the head and neck. (R. p. 84) Appellant's doctor, John B. Doyle, examined Barrett April 10, 1956, but the defendant failed to put him on the stand in the trial below. On motion to set aside the judgment on the ground that it was obtained by fraud of plaintiff and Dr. Darrington Weaver, the defendant filed in support thereof, a letter by their examining physician, who stated as follows:

> "From these data it would appear that as a result of the accident of February 11, 1955, the patient received a contusion of the scalp without losing consciousness. The evolusion of his symptoms was gradual and unquestionably was aggravated by resentment toward an official of the commissary department of the Railway at Chicago. The clinical picture is not that of spasmodic torticollis but rather of habit spasms. In my opinion Mr. Bar-

rett's symptoms are due entirely to mental causes. In this case settlement of the litigation may be expected to be followed by his prompt recovery."

The defendant and appellant agreed to settle the case and a satisfaction of judgment was signed by plaintiff's attorney. Exhibit A (R. p. 34) Dr. Weaver delivered this satisfaction to the office of Lewis Welsh, on the 6th day of June, 1956. On the 20th of June Barrett delivered the final papers to Mr. Welsh's office. It was on this day that Mr. Welsh observed the plaintiff jerking his neck while in his office and then observed him for a few moments at the elevator, apparently without jerking his head or neck. As far as Barfett was concerned from this moment on his case was settled, just awaiting the check which had been promised by the defendant. From this moment on according to the affidavit of appellant's doctor, Barrett could expect to have immediate relief from the affliction of his neck and head which Dr. Doyle attributed to mental causes and would be relieved by an end of litigation. Mr. Welsh was upset because of a call which he claims he received from Dr. Weaver because Dr. Weaver wanted to know how soon the defendant would deliver Mr. Barrett's draft to him. Dr. Weaver denies this call in his affidavit. The defendant says this evidence together with the interest displayed by Dr. Weaver attending the trial and his conviction for fraud supports their claim that Barrett and Dr. Weaver conspired to defraud the Santa Fe Railway. Although the defendants do not say so, they imply by argument only,

that Dr. Weaver conceived the idea that plaintiff should feign that he had what Dr. Goren calls spasmodic torticollis. The plaintiff in opposition to defendant's motion filed affidavits by fellow employees, to the effect that they observed plaintiff jerking his head for about six months prior to the time that Dr. Weaver first met and treated the plaintiff. Arnold Roberts (R. p. 36), Leonard Nash (R. p. 37), Rhodes Robinson (R. p. 39), Walter Bogeman (R. p. 40), Jessie Mitchell (R. p. 41), Richard Goldsmith (R. p. 42), Calvin Davis (R. p. 44).

Several of these employees were subpoenaed by plaintiff but the company advised them not to attend, that they were not legally served with process. Jessie Mitchell (R. pp. 41, 42), Calvin Davis (R. pp. 43, 44).

In the court below Mr. Welsh stated that his motion was based primarily on what the court was able to observe and the pictures of the undercover men. (R. p. 128) The pictures cover a period of less than fourteen minutes that Barrett was under observation by the undercover men.

After observing the pictures and listening to argument the court observed as follows: (1) He was not certain after considering the evidence (pictures and affidavits) that the jury would have come to a different conclusion. (2) There was no evidence of fraud or misrepresentation. (3) After reading Dr. Doyle's affidavit that the defendant could have expected what was revealed by the pictures and affidavits. The de-

fendant places great stress on the fact that the plaintiff testified that he twitched all the time and that he was "seldom without it". There was no crossexamination as to what the plaintiff meant by "seldom without it". It may have been one, two, or six hours. Webster's new dictionary defines seldom as, rarely, infrequently. Without further explanation it could have meant anything.

At the hearing on the motion plaintiff filed an affidavit by Dr. Weaver disclosing that he was licensed to practice his profession in the State of California and that he was on December 23, 1953, granted a full and unconditional pardon for the offenses referred to in defendant's affidavit. (R. pp. 47, 48). A photostat of the pardon was introduced in evidence but has failed to find its way to this court.

Dr. Weaver's actions in this matter were always open and above board. Immediately upon receiving Barrett as a patient he wrote a letter to the commissary department so advising them. The railroad acknowledged Dr. Weaver's letter and asked for amplification and on January 30, 1956, Dr. Weaver wrote the defendant stating that Barrett was suffering from, (1) Traumatic torticollis, (2) General neurosis and psychosis, due to trauma, (3) General Debility. (R. pp. 43, 44) The plaintiff's deposition was taken on March 7, 1956, where his jerking of the neck was observed by attorney for defendant, and plaintiff stated that he went to see Dr. Weaver on the 17th day of December, 1955. Dr. Weaver's conviction was not only

a matter of record in Los Angeles County, it was recorded in the decision of the District Court of Appeals, cited by the appellant. In the court below Mr. Welsh stated: (R. p. 155)

> "We also point out in our memorandum of points and authorities and our affidavits disclose the income interest of Dr. Darrington Weaver. Now, that is background. That in *itself spells nothing,* but coupled with the other factors we believe have been admitted by plaintiff's own affidavits, *it at least indicates a gross exaggeration.*"

Here we have plaintiff's own counsel admitting that at the most he has shown an exaggeration, which we also deny and contend the affidavits merely show a difference of opinion between doctors as to the duration of the injury, and the character of the injury. But at the trial the defendant thought his cause would be better served by not challenging the testimony of the plaintiff's medical testimony. Let us examine the other factors the defendant claims supports his suggestion of exaggeration. The testimony of undercover men and their pictures which disclose a period of observation of 14 minutes and in one of these pictures they admit the plaintiff was twitching. In respect to Dr. Weaver, the facts in addition to his conviction is the fact (1) That as a licensed practicing physician he served Barrett in his capacity as a physician beginning December 17, 1955. (2) That he recommended Dr. Goren to the plaintiff. (3) That Dr. Weaver attended portions of the trial and was seen talking to counsel for plaintiff.

(4) After the trial he delivered a paper to Mr. Welsh's office. (5) That Dr. Weaver phoned Mr. Welsh's office and inquired when the draft would be ready for delivery. (Dr. Weaver denies this.) From these facts the defendant must contend, that as a matter of law, fraud has been established.

ARGUMENT
FRAUD IS ODIUS AND NEVER PRESUMED

The decisions are uniform in holding that fraud is never presumed and must be established by proof.

> "Fraud is odius and is never presumed; it must be established by proof. The presumption is always in favor of fair dealing, except perhaps where confidential relations are involved. This presumption is said to approximate in strength that of innocence of crime. The burden of proving fraud, is therefore on the person asserting it."

12 Cal. Jur. pg. 816;
Truett v. Onderdonk, 120 Cal. 581;
Luckenbach Estate, 205 Cal. 292.

In *Assman v. Fleming,* 159 Fed. 2d 332, at 336, it was held, at page 336:

> "The burden of proving such fraud and misrepresentation is of course, upon the applicant and fraud is not to be presumed and must ordinarily be proved by clear and convincing evidence. It must also be made to appear, where application is

made by defendant that he has a meritorious defense to the action."

It is obvious that the defendant and appellant has failed to show that he has a meritorious defense to this action, all issues of fact raised by his affidavits have been resolved against him by the court decision below. The court below found that,

"but there isn't any fraud or misrepresentation." (R. p. 180)

NO INFERENCE OF WRONGDOING CAN BE DRAWN FROM DR. WEAVER'S CONVICTION

"It has been held that a pardon 'releases the punishment and blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense.' " *Matter of Emmons,* 29 Cal. App. 123; Section 4853, Penal Code (effect of pardon).

THERE IS NO EVIDENCE OF CONSPIRACY

The gist of the crime of conspiracy is the agreement to commit an offense and an overt act in the furtherance of the agreement.

People v. Black, 45 C.A. 2d 87;
People v. Gordon, 71 C.A. 2d 606.

We again quote from the argument of counsel in the court below:

> "And we don't contend that Weaver's situation is and of itself determinative of anything."

Arguing below the defendant only claimed Dr. Weaver's connection with the case, was "cause for grave suspicion." (R. p. 177) Yet the defendant would have this court magnify what counsel calls suspicious circumstances into facts which amount to fraud as a matter of law. The appellant therefore fails to meet his burden of establishing fraud by clear and convincing evidence.

THE FRAUD MUST BE SUCH AS PREVENTED THE DEFENDANT FROM MAKING A FULL AND FAIR DEFENSE.

It is clear that under this rule defendant was advised fully of Dr. Weaver's connection with the case at all times, and should have attempted to call the attention of the jury to any fact which they deemed of a suspicious nature. But in that Dr. Weaver was never a witness in the case, unless they could have established a conspiracy in the case, any action he might have had in other cases becomes immaterial. The cases appellant cites in respect to error in rejecting proffered evidence of like frauds has no application in this case. Referring to *Knudsen v. Domestic Utilities,* 264 Fed. 470, and other cases.

In *Town of Boynton v. White Construction Company,* 64 Fed. 2d 193, the court held as follows:

> "The most that can be said of plaintiff's case is that there is some evidence that the judgment was obtained on an altered contract, and that the amount recovered was through the fraud and collusion of the City Council and the Engineer in allowing the final estimate for more than it ought to have been. There is neither claim nor proof that 'the fraud charged really prevented the party complaining from making a full and fair defense.' There is neither claim nor proof that anything was done by the contractor to prevent the city from making its defense" . . . "The most that can be said of plaintiff's evidence is that if it had been

> offered in the original suit, it would have presented an issue for decision; offered as it was in this suit to set aside the judgment, it falls far below the measure of proof required."

It was held in *Toledo Co. v. Computing Company,* 261 U.S. 421:

> "We do not find ourselves obliged to enter upon a consideration of the sometimes nice distinction made between intrinsic and extrinsic frauds in the application of the rule, because in any case to justify setting aside a decree for fraud whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense. If it does not so appear, then proof of the ultimate fact, to wit, that the decree was obtained by fraud fails."

Also see:

Harrison v. Triplex Mines, 33 Fed. 2d 671;
Wheiles v. Aetna Life Ins., 68 Fed. 2d 99;
Miller Rubber Company v. Massey, 36 Fed. 2d 466;
Simonds v. Norwich Union, 73 Fed. 2d 415;
Fiske et al. v. Fuller, 125 Fed. 2d 849;
Hadden v. Ramsey Products, Inc., 196 Fed. 2d 92;
U. S. v. Throcmorton, 98 U.S. 93.

The appellant seems to place great reliance on the case of *Chicago, Rock Island & Pacific Railway Co. v. Calicotte,* 267 Fed. 799. The difference in the factual

situations is apparent from a reading of the case. In the *Calicotte* case fraud was proved clearly and convincingly. It was proved beyond a reasonable doubt that in fact Calicotte was never paralyzed. That in conspiracy with others he prevented this from becoming known until there was a falling out of the conspirators. That temporary paralysis can be brought about by artificial means. Calicotte was seen in woman's clothing, for the purpose of disguise, and on being discovered stated "the jig is up". That he threatened to kill a member of his wife's family if they disclosed his hoax. That his own doctor testified against him on the motion to the effect that if he had ever walked prior to his examination that the feigned condition was brought about by artificial means.

The actions and statements set up by the defendant in appendix A and B disclose factual matters that were resolved against the appellant by the action of the jury and the court below in deciding the motion against the appellant.

It thus becomes apparent that the appellant has failed to establish that the judgment was procured by fraud of appellee or by reason of a conspiracy with Dr. Weaver, because:

(1) The use of the word "seldom" without further elaboration could have meant most any time—one hour, two hours, six hours or more.
(2) This court will not weigh the effect of such testimony, which has been passed upon, by the jury and court.

(3) The attempted impeachment of Dr. Weaver cannot be considered as evidence of a conspiracy.

(4) Dr. Weaver is licensed to practice his profession in the State of California, and he has received a full and unconditional pardon for the offenses in question.

(5) No culpable act can be inferred from the plaintiff going to Dr. Weaver for treatment, nor from the errands Dr. Weaver did for plaintiff, nor from his presence in court.

(6) The issue of fraud comes too late because it is based on evidence which has been considered by the jury and the court, with the exception of the pictures taken by the undercover men, which merely confirms what the defendant might expect from the testimony of their own doctor.

(7) The plaintiff did nothing to mislead defendant or prevent him from making his defense.

We respectfully submit that the appellant has failed to meet his burden of establishing fraud by clear and convincing evidence, and ask that the order of the court denying appellant's motion to set aside the judgment be affirmed.

Respectfully submitted,

ERWIN P. WERNER,
Attorney for Plaintiff.